# UNITED STATES BANKRUPTCY COURT
# NORTHERN DISTRICT OF TEXAS
# DALLAS DIVISION

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| **IN RE:** | § | |
| | § | |
| **PHYSICIANS RESOURCE GROUP, INC.** | § | **Case No. 00-30748 HDH-11** |
| | § | |
| **EYECORP, INC.** | § | **Case No. 00-33410 HDH-11** |
| | § | |
| **Debtors** | § | **Jointly Administered Under** |
| | § | **Case No. 00-30748 HDH-11** |

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| **PHYSICIANS RESOURCE GROUP, INC., PRG TENNESSEE II, INC., PRG TENNESSEE IV, INC., and EYECORP,, INC., by the OVERSIGHT COMMITTEE Appointed Under the Modified First Amended Plan of Reorganization** | § | |
| | § | |
| **Plaintiffs/Counter Defendants** | § | |
| | § | |
| **v.** | § | **Adversary No. 01-3515** |
| | § | **(Consolidated With)** |
| **LUCIUS E. BURCH, III, and P.L.L.C., JOHN E. LINN, M.D., THOMAS A. BROWNING, M.D., ANDREW KRAUSS, M.D.** | § | **Adversary No. 01-3585** |
| | § | |
| **Defendants** | § | |
| | § | |
| **DAVID MEYER, VITREORETINAL FOUNDATION, and RME ASSOCIATES** | § | |
| | § | |
| **Defendants/Counter Plaintiffs** | § | |

## MEMORANDUM OPINION REGARDING (1) PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES, EXPENSES AND PREJUDGMENT INTEREST AND BRIEF IN SUPPORT OF THEIR MOTION FOR SANCTIONS; AND (2) PLAINTIFFS' MOTION FOR SANCTIONS RELATED TO COUNTERCLAIMS

## ISSUE

This opinion addresses the award of attorneys' fees and expenses to the prevailing party in this adversary proceeding, as well as the award of prejudgment interest in fraudulent transfer recoveries by the Plaintiffs.

## HOW WE GOT HERE

On May 1, 2003, Plaintiffs filed Plaintiffs' Application for Attorneys' Fees, Expenses and Prejudgment Interest and Brief in Support of Their Motion for Sanctions ("Application"), and Plaintiffs' Motion for Sanctions Related to Counterclaims ("Motion"). The Application was supported by the Declaration of Sydney McDole ("McDole Declaration"), which was admitted into evidence at the hearing on the Application and Motion, which was held on June 24, 2003. Debtors filed objections and declarations in support of such objections, which were also admitted into evidence at the hearing. As has been customary in this adversary proceeding, various objections were made to each party's evidence. The Court overrules those objections and has considered the entire record in reaching the conclusions made in this opinion. The Application and Motion seek attorneys' fees and costs associated with this Court's findings set forth in its Findings of Fact and Conclusions of Law entered on March 14, 2003, that the Plaintiffs' are entitled to judgment on

> (1) claims pursuant to § 548(a)(1)(A) of the Bankruptcy Code and § 544(b) of the Bankruptcy Code, through § 24.005(a)(1) of the Texas Business and Commerce Code, for fraudulent transfer by EyeCorp of land and a building,
>
> (2) claims pursuant to § 544(b) of the Bankruptcy Code, through § 24.005(a)(2) and § 24.006(a) of the Texas Business and Commerce Code, for fraudulent transfer with respect to the payment of certain expenses by PRG (the "LOI expenses"),
>
> (3) claims for recovery on a promissory note against VRF and for collection on a Guaranty against Drs. Meyer, Linn, Browning, and Krauss ("Note and Guaranty"),

and

(4) all counterclaims by the Defendants, including the Defendants' claim for breach of the VRF Services Agreement.

The Plaintiffs also requested an award of prejudgment interest.

On June 24, 2003, the day of the hearing on the Application and Motion, the Defendants filed a Motion for Reconsideration of Findings and Conclusions Regarding Land and Building and to Amend and Make Additional Findings and Conclusions ("Motion for Reconsideration"). The Defendants also requested the entry of a separate judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure. On July 9, 2003, the Court entered an order denying the Motion for Reconsideration, in part, and setting a briefing schedule and hearing date on the remaining issues to be considered. The Court noted that it would enter a separate judgment after ruling on the issue of Plaintiffs' entitlement to attorneys' fees, costs, and prejudgment interest. A hearing was held on the Motion for Reconsideration on August 19, 2003. After reviewing the evidence presented at trial and the arguments of counsel at the hearing on the Motion for Reconsideration, the Court, on September 24, 2003, entered an order denying the Motion for Reconsideration.

## ATTORNEYS' FEES AND COSTS

In their Application for attorneys' fees and costs, the Plaintiffs cite this Court's Findings and Conclusions as the basis for an award of attorneys' fees and costs with respect to each of the claims on which they prevailed as well as its successful defense of a breach of contract counterclaim. Although the Court did conclude that "Plaintiffs are entitled to reasonable attorneys' fees and expenses," (Findings and Conclusions, ¶ 265), this statement was not intended to create a right to attorneys' fees to which the Plaintiff's would not otherwise have been entitled under the law. The

Plaintiffs, in their Motion for Sanctions, also requested an award of attorneys' fees and costs in connection with their defense of the remaining counterclaims by the Defendants pursuant to Rule 11 of the Federal Rules of Civil Procedure, made applicable herein by Rule 9011 of the Federal Rules of Bankruptcy Procedure, and the inherent powers of the Court. Finally, the Plaintiffs have requested reimbursement for attorneys' fees incurred in preparing the fee application.

**May a Prevailing Party to a Litigation Recover Attorneys' Fees?**

In this country, courts follow the "American Rule" regarding the payment of attorneys' fees. "Under the American Rule it is well established that attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'" *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters and Joiners of Am.*, 456 U.S. 717, 721, 102 S.Ct. 2112, 2114, 72 L.Ed.2d 511 (1982)(quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)); *see also Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1004 (5th Cir. 1995)("Under the well-established American Rule used in the federal courts, 'absent statute or enforceable contract, litigants pay their own attorney's fees.'")(quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257, 95 S.Ct. 1612, 1621, 44 L.Ed.2d 141 (1975)). The United States Supreme Court has recognized three equitable exceptions to the general rule stated above. The first is the "common fund exception" which is derived "not from a court's power to control litigants, but from its historic equity jurisdiction and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S.Ct. 2123, 2133, 115 L.Ed.2d 27 (1991)(citations omitted). The second is an award of attorneys' fees as a sanction for "willful disobedience of a court

order." *Id.* Third, a court may assess attorneys' fees "when a party has '"acted in bad faith, vexatiously, wantonly, or for oppressive reasons."'" *Id.* at 45-46, 111 S.Ct. at 2133 (quoting *Alyeska*, 421 U.S. at 258-59, 95 S.Ct. at 1622-23)(quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974)))(other citations omitted). With respect to this last exception to the American Rule, the Supreme Court noted, "The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself . . . ." *Id.* at 46, 111 S.Ct. at 2133. Thus, absent statutory or contractual provisions for an award of attorneys' fees and costs, a plaintiff may recover such fees and costs only if it can show entitlement under one of the three exceptions recognized by the Supreme Court.

**Are Plaintiffs' Entitled to Attorneys' Fees and Costs in this Adversary Proceeding**

*1. Note and Guaranty*

EyeCorp is seeking an award of $569,233.24 in attorneys' fees and $60,583.74 in expenses in connection with its claims under the Note and Guaranty. In its Findings of Fact and Conclusions of Law, the Court found that EyeCorp is "entitled to attorneys' fees as allowed by section 38.001 of the Texas Civil Practice and Remedies Code and as provided in the Note." (Findings and Conclusions, ¶ 236). The Court also found that EyeCorp is "entitled to attorneys' fees as allowed by section 38.001 of the Texas Civil Practice and Remedies Code and as provided in the Guaranty." (Findings and Conclusions, ¶ 240).

*2. Defense of Breach of VRF Services Agreement Counterclaim*

PRG is seeking $538,715.81 in attorneys' fees and $129,447.06 in expenses in connection

with its defense of the counterclaim for breach of the VRF Services Agreement. The VRF Services Agreement, governed by Tennessee law, also contains express language providing for attorneys' fees and costs to the party prevailing in any litigation regarding the agreement: "If legal action is commenced by any party to enforce or defend its rights under this Agreement, the prevailing party in such action shall be entitled to recover its costs and reasonable attorneys' fees . . . ." (VRF Services Agreement, ¶ 16.10, Plaintiff's Exhibit 51). PRG, having successfully defended the claim of VRF alleging breach by PRG of the VRF Services Agreement, is entitled to reasonable attorneys' fees and costs for its defense of that counterclaim.

*3. Fraudulent Transfers of the Land and Building and LOI Expenses*

The Plaintiffs seek an award of $765,303.18 in attorneys' fees and $76,862.01 in expenses in connection with the fraudulent transfer of the Land and Building and $131,855.58 in attorneys' fees and $14,807.51 in expenses in connection with the claim for fraudulent transfer of the LOI expenses. Although the Plaintiffs assert in their Application that "[t]he Court determined that plaintiffs are entitled to recover attorneys' fees and expenses for their claim for fraudulent transfers of the land and building as well as PRG's LOI expense payments," *see* Application, p. 6 (citing Findings and Conclusions ¶ 265), the Court made no such determination. The Court simply stated in ¶ 265 of its Findings and Conclusions that the Plaintiffs were entitled to an award of attorneys' fees and costs. The amount and extent of the award would be determined upon application by the Plaintiffs for such fees and costs. As the Court noted above, this Court does not have the authority, nor did it intend, to create an entitlement to attorneys' fees or costs that the Plaintiffs would not otherwise have been entitled to by law. Because the Findings and Conclusions did not find that the

Plaintiffs were entitled to an award of attorneys' fees and costs with respect to the fraudulent transfer claims, the Court will now address whether the Plaintiffs have shown that an award is sustainable as to attorneys' fees and costs related to those claims.

The Plaintiffs assert in their Application that an award of attorneys' fees and costs in connection with the fraudulent transfer claims is proper because the Defendants acted in bad faith. A finding of bad faith could form the basis for an award by this Court of attorneys' fees and costs. Such an award would be based on this Court's inherent power and is one of the exceptions to the American Rule recognized by the Supreme Court. *See, Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123, 2133, 115 L.Ed.2d 27 (1991). In fact, this Court's inherent power to impose attorneys' fees as a sanction may only be exercised in those cases "in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders." *Id.* at 47, 111 S.Ct. at 2134.

Here, the Plaintiffs allege that Dr. Meyer's claim that PRG promised to transfer the Land and Building to him for little or no consideration was a "lie" and a fraud on the Court. (Application, p.8) The Plaintiffs also assert that Dr. Meyer's defense to the LOI Expense transfers (i.e., that PRG received value for the transfers) was "no more credible than his contentions regarding the land and building." (Application, p. 9). Although the Court found that Dr. Meyer's "story" was not credible, it did not make a finding that his defenses were prosecuted in bad faith. The Defendants' failure to prevail on these factual issues does not rise to the level of bad faith conduct.

In almost every case in which there are contested issues of fact, a court must make a finding as to which party's version of the facts is more credible, and, necessarily, one party always loses. This does not mean that the losing party has proceeded in bad faith. *See, Syufy Enters. v. Am.*

*Multicinema, Inc.*, 602 F. Supp. 1466, 1472 (N.D. Cal 1983)("The mere fact that a party is unsuccessful on its claims does not warrant a finding of bad faith."). If that were the case, the American Rule would be eviscerated. As the Fifth Circuit has noted,

> By refusing to penalize a litigant whose judgment concerning the merits of his position turns out to be in error, the American Rule protects the right to go to court and litigate a non-frivolous claim or defense. The unsuccessful litigant is not penalized even when an injured party whose claim is upheld is not made completely whole because of the cost of litigation.

*Sanchez v. Rowe*, 870 F.2d 291, 294 (5th Cir. 1989)(quoting *Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226, 1231 (6th Cir. 1984)). In *Galveston County Nav. Dist. No. 1 v. Hopson Towing Co.*, 92 F.3d 353, 360 (5th Cir. 1996), the Fifth Circuit reversed an award by the district court to the successful party of attorneys' fees based on a finding by the district court that the defendants had acted in bad faith. In so doing the Fifth Circuit stated,

> The district court's observations that this defense was "unsupported *factually*," "contradictory *factually*," and "utterly incredible" apparently stem from the court's determination *after trial* that the defendants' witnesses were not credible. While this determination certainly supports the court's assessments of fault and liability, it does not support the court's assertion that "this case borders on the frivolous," much less any determination that the defense position in or conduct of the litigation was so egregious and in bad faith as to authorize an award of attorney's fees under *Alyeska*.

*Id.* Likewise, this Court finds that the lack of credible testimony by Dr. Meyer in connection with his defense of the fraudulent transfer claims does not support a finding that the Defendants conducted their defenses in bad faith. Absent a finding of bad faith, the court may not use its inherent powers to award attorneys' fees as a sanction. Having no statutory, contractual or other basis for an award of attorneys' fees and costs with respect to the fraudulent transfer claims, the Court finds that the Plaintiffs are not entitled to an award of attorneys' fees or costs as to those

claims.

*4. Defense of Counterclaims other than the Breach of the VRF Services Agreement Counterclaim*

The Plaintiffs seek an award of $353,523.75 in attorneys' fees and $44,506.15 in expenses incurred in connection with their defense of the Defendants' counterclaims (other than the defense of the VRF Services Agreement). The bases for the Plaintiffs' request are Rule 11 and the inherent powers of the Court to impose sanctions for bad faith conduct. The Plaintiffs assert that "[t]he counterclaims were designed to harass plaintiffs, delay and multiply the proceedings, and increase plaintiffs' costs to litigate the case." In support of this claim, the Plaintiffs' cite the Defendants' abandonment of their counterclaims (except for the breach of the VRF Services Agreement counterclaim) in the middle of trial, after the close of the Plaintiffs' case. The Plaintiffs also allege that the Defendants' decision not to depose Plaintiffs' expert witnesses on the counterclaims before trial and the Defendants' decision not to open on their counterclaims until after the close of Plaintiffs' case indicates that the Defendants never intended to pursue the counterclaims and that they were, therefore, brought for an improper purpose.

*a. Should Defendants be sanctioned under Rule 9011?*

Because Rule 9011 of the Federal Rules of Bankruptcy Procedure is essentially the same as Rule 11 of the Federal Rules of Civil Procedure, cases interpreting Rule 11 are instructive. *See, In re Weiss*, 111 F.3d 1159, 1170 (4th Cir. 1997)("In deciding cases based on violations of Rule 9011, courts may look to cases that interpret Federal Rule of Civil Procedure 11.")(citing *Valley Nat'l Bank of Ariz. v. Needler (In re Grantham Bros.)*, 922 F.2d 1438, 1441 (9th Cir. 1991)); *see also, In re Highgate Equities, Ltd.*, 279 F.3d 148, 151 (2d Cir. 2002); *In re Mahendra*, 131 F.3d 750, 759 (8th

Cir. 1997).

In the Fifth Circuit's most recent pronouncement on Rule 11(b) of the Federal Rules of Civil Procedure, the court held that each obligation under Rule 11(b) must be satisfied, and that violation of any of the obligations justifies sanctions. *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 802 (5th Cir. 2003). In this case the Plaintiffs only allege that the Defendants violated subsection (b)(1) of the Rule 9011, which provides, in pertinent part,

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

In determining whether a litigant has violated subsection (b)(1) of Rule 9011, the Court must look to objective evidence that the party presented a pleading or pleadings for an improper purpose. *See, Chambers v. NASCO, Inc.*, 501 U.S. 32, 47, 111 S.Ct. 2123, 2134, 115 L.Ed.2d 27 (1991)("Rule 11 . . . imposes an objective standard of reasonable inquiry which does not mandate a finding of bad faith."); *see also Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 802 (5th Cir. 2003)("[I]n determining compliance *vel non* with each obligation [under Rule 11], 'the standard under which an attorney is measured is an objective, not subjective, standard of reasonableness under the circumstances.'")(quoting *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1024 (5th Cir. 1994)). In *Whitehead*, the Fifth Circuit noted that while courts generally do not sanction attorneys who make nonfrivolous representations, sanctions may be imposed "where it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose." *Whitehead*, 332 F.2d at 805. The Court recounted several situations in which the filing of nonfrivolous

pleadings could be sanctioned: (1) when the filing of excessive motions constitutes harassment, *id.* (citing *Sheets v. Yamaha Motor Corp.*, 891 F.2d 533, 538 (5th Cir. 1990)), (2) when an otherwise legitimate pleading contains abusive language toward opposing counsel, *id.* (citing *Coats v. Pierre*, 890 F.2d 728, 734 (5th Cir.), *cert. denied*, 498 U.S. 821, 111 S.Ct. 70, 112 L.Ed.2d 44 (1990)), and (3) when a pleading or motion is filed without a sincere intent to pursue it. *Id.* (citing *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247 (4th Cir. 1986).

Here, the Plaintiffs are essentially arguing that the Defendants never intended to pursue their counterclaims and that they were brought to harass the Plaintiffs and increase the cost of litigation for the Plaintiffs. Although the Plaintiffs believe that the Defendants' counterclaims were brought for an improper purpose, there is no objective evidence that supports such a finding. Defendants sought and obtained Court approval before bringing the counterclaims. Defendants stated a legitimate purpose for bringing those counterclaims: to avoid having claims that the Defendants believed to be compulsory and necessary to vindicate their rights barred for failure to timely file them. No objective evidence suggests that the timing of the Defendants' withdrawal of their counterclaims (i.e., after the close of the Plaintiffs' case) was intended to cause delay or to increase costs of litigation for the Plaintiffs. Instead, Defendants submit that

> the Court's subsequent rulings on the parties motions for summary judgment, the Plaintiffs' subsequent position on the release contained in the VRF Termination Agreement, the assessment mid-trial by Defendants' counsel on whether Plaintiffs carried their burden at trial as to PRG's remaining claim in this lawsuit, [and] the assessment mid-trial by Defendants' counsel on what was the appropriate and best use of Defendants' resources and this Court's time for the remainder of trial . . . provides reasonably clear legal justification shown for the subsequent dismissal of those counterclaims during trial.

The Defendants' stated purposes for the filing of the counterclaims and the timing of the withdrawal

of those counterclaims are reasonable litigation purposes.

Plaintiffs have produced no evidence to show that Defendants' purposes were improper. This is not like the case in *Cohen*, in which the Fourth Circuit upheld an award of sanctions against a party for filing an otherwise valid pleading without a sincere intent to pursue it based on the fact that evidence in the district court established that the defendant and his attorney decided *in advance* to withdraw the pleading if the plaintiff opposed it. Here, all we have is Plaintiffs' subjective belief that the Defendants never intended to pursue their counterclaims. As the Fourth Circuit explained in *In re Kunstler*, 914 F.2d 505, 518-19 (4th Cir. 1990),

> [I]t is not enough that the injured party subjectively believes that a lawsuit was brought to harass . . . ; instead, such improper purposes must be derived from the motive of the signer in pursuing the suit. An opponent in a lawsuit, particularly a defendant, will nearly always subjectively feel that the lawsuit was brought for less than proper purposes; plaintiffs and defendants are not often on congenial terms at the time a suit is brought. However, a court must ignore evidence of the injured party's subjective beliefs and look for more objective evidence of the signer's purpose.

*See also, Whitehead*, 332 F.3d at 805 (where the Fifth Circuit noted that a court should not read an ulterior motive into an otherwise legitimate pleading except in the exceptional case where improper purpose is "objectively ascertainable.")(citing *Sheets*, 891 F.2d at 537-38). Thus, Plaintiffs' suppositions, alone, cannot form the basis for a finding that the Defendants or their attorneys breached their obligations under Rule 9011. The Court finds that the Defendants' conduct in the initial filing and later withdrawal of its counterclaims was not in violation of Rule 9011. Therefore, the Plaintiffs' motion for sanctions pursuant to Rule 9011 must be denied.

*b. Should Defendants be sanctioned pursuant to the inherent powers of the Court?*

The Plaintiffs also request attorneys' fees and costs as sanctions against the Defendants

pursuant to the Court's inherent powers. As discussed above, this Court's inherent power to sanction litigation conduct is limited to instances in which the party has conducted litigation in bad faith. Because the Defendants had a legitimate purpose in bringing the counterclaims and in the timing of the withdrawal of those counterclaims and because there is no objective evidence to show that the claims were brought or withdrawn in bad faith, there is no basis for sanctions against these Defendants with respect to the counterclaims.

*5. Preparation of Fee Application*

Plaintiffs are entitled to reasonable attorneys' fees for the time spent in preparing the fee application. *See generally, In re Braswell Motor Freight Lines, Inc.*, 630 F.2d 348, 351 (5th Cir. 1980).

**Are the Requested Attorneys' Fees and Costs "Reasonable"?**

Having established that the Plaintiffs are entitled to recover attorneys' fees and costs related to their claims on the Note and Guarantees and to their defense of the Defendants' counterclaim on the VRF Services Agreement, the Court must now address the Defendants' objections to the reasonableness of the attorneys' fees and costs sought by the Plaintiffs.

As a response to the Defendants' general contention that the fees and expenses sought by the Plaintiffs are too high, the Court notes that it was the Defendants' pretrial and trial strategies that significantly contributed to the fees and expenses incurred by the Plaintiffs. This adversary proceeding was vigorously contested. The Defendants pursued a pretrial and trial strategy that unnecessarily increased the time required to be expended by counsel for the Plaintiffs. With respect to EyeCorp's claim on the Note and Guaranty, Dr. Meyer took the position prior to the trial and even

after the trial started that he was not liable on the Note and Guaranty based on his "story" that the Note and Guaranty were never intended to be enforceable. During his testimony, however, Dr. Meyer eventually conceded liability under the Note and Guaranty. The Plaintiffs spent a substantial amount of time and resources in pursuing their claims on the Note and Guaranty. If Dr. Meyer had simply admitted, in the beginning, rather than waiting until the middle of trial, that he was liable on the Note and Guaranty, a substantial amount of the costs and expenses that the Defendants are complaining about in their objections to the Motion and Application would not have been incurred. Having chosen the path of greatest resistance, the Defendants will not be permitted to complain too loudly regarding the aggregate amount of Plaintiffs' fees.

The Court will now address the Defendants' specific objections to the attorneys' fees and costs sought by the Plaintiffs.

## Attorneys' Fees

*1. Allocation of Time*

In Plaintiffs' application for attorneys' fees, counsel indicated that matters that were general in nature and could not be discretely allocated to the prosecution or defense of a particular claim were allocated on a percentage basis based on counsel's estimate of "the relative effort required with respect to each claim." The allocations to the claims on which the Plaintiffs prevailed and to which they are entitled to recover attorneys' fees were 25% (Note and Guaranty) prior to September 2002, 40% (Note and Guaranty and defense of VRF Services Agreement) for services performed after September 2002 through January 2003, and 45% (Note and Guaranty and defense of VRF Service Agreement counterclaim) for services performed from February 1, 2003, until February 18, 2003 (the

date on which plaintiffs filed their amended proposed findings of fact and conclusions of law, and the last date for which Plaintiffs seek fees). All fees of non-lawyers (including legal assistants, project assistants, and library staff) were allocated based on the same percentages.

The Defendants object to the Plaintiffs' method of allocation arguing that the Plaintiffs have a duty to segregate recoverable fees from those that are not recoverable. (See, Defendant's Response to Plaintiffs' Application for Attorneys' Fees, Expenses, and Prejudgment Interest, p. 3)(citing, *inter alia*, *Riley v. City of Jackson*, 99 F.3d 757, 760 (5th Cir. 1996); *In re Smith*, 966 F.2d 973, 978 (5th Cir. 1992); *Stine v. Marathon Oil Co.*, 976 F.2d 254, 264 (5th Cir. 1992)). While the Court agrees that the Plaintiffs have a duty to segregate recoverable fees from those that are not recoverable, where particular services rendered are general in nature and not attributable to any particular claim, the only practical method of "segregating" the recoverable services from the non-recoverable services is by a percentage allocation method based on the relative time spent on each claim. The Fifth Circuit has approved this method of allocation of services when it is impossible to discretely segregate time spent among claims. *See, Chemical Mfrs. Ass'n v. U.S.E.P.A.*, 885 F.2d 1276, 1283 (5th Cir. 1989)(where the court used a percentage allocation method in disallowing attorneys' fees related to time allocable to issues on which the plaintiff did not prevail, describing such allocation method as "a fair measure of the time allocable to issues on which the [party] did not prevail . . . ."); *Knights of Ku Klux Klan, Realm of La. v. E. Baton Rouge Parish Sch. Bd.*, 735 F.2d 895, 901 (5th Cir. 1983)(where the court upheld the district court's percentage allocation in awarding attorneys' fees). Thus, the Court finds the Plaintiffs' method of allocating "general" time spent among the various claims to be fair and reasonable.

*2. Excessive Rates*

Defendants object to the rates being charged by the Plaintiffs' attorneys as excessive. In addressing the rates to be approved in connection with an award of "reasonable fees" pursuant to a statute, the Fifth Circuit stated that the reasonable hourly rate should be based on the "prevailing market rates in the relevant community." *League of United Latin Am. Citizens No. 4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1234 (5th Cir. 1997)(quoting *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984)). Only "[w]hen the attorney's customary hourly rate is within the range of hourly fees in the prevailing market," should that rate be considered in setting a reasonable hourly rate. *Id.* (citing *Islamic Ctr. of Miss., Inc. v. City of Starkville, Miss.*, 876 F.2d 465, 469 (5th Cir. 1989)). The "relevant market for purposes of determining the prevailing rate to be paid in a fee award is the community in which the district court sits." *Tollett v. City of Kemah*, 285 F.3d 357, 368 (5th Cir. 2002)(quoting *Scham v. Dist. Courts Trying Criminal Cases*, 148 F.3d 554, 558 (5th Cir. 1998)). In *Tollett*, the Fifth Circuit stated that "[g]enerally, the reasonable hourly rate for a particular community is established through affidavits of other attorneys practicing there." *Id.* (citation omitted). Here, Plaintiffs' counsel did not submit any evidence or documentation to establish the customary rates charged in the Dallas/Ft. Worth community. Of the three fee applications submitted by Plaintiffs regarding fees charged by other firms, only one was for services rendered by Dallas attorneys in Texas. Of the other two, one was for a fee application submitted in the *Enron* bankruptcy case in New York, and the other was for a fee application submitted in Delaware. On the other hand, the Defendants submitted copies of fee applications of law firms of similar reputation in the community who performed services in this district to establish that the rates

charged by Plaintiffs' counsel do not fall within the range of the prevailing market rates. The Defendants' submissions indicate that rates for partners practicing in this Court ranged from $235 to $435 and that rates for associates ranged from $140 to $240. The one fee application attached as supporting documentation by Plaintiffs' counsel that showed rates charged by Dallas attorneys in Texas indicated that the highest rate for a partner was $550 per hour and that the rates for associates were between $250 per hour to $315 per hour for associates.[1] Although this evidence relates to a fee application filed in the Southern District of Texas, the market in that district is sufficiently similar to the Dallas market such that the evidence is helpful in determining the prevailing market rates in Dallas. Plaintiffs' attorneys charged rates of $565 per hour for Ms. McDole, a partner, and $625 per hour for Mr. Gordon, also a partner. These rates are a little high and do not fall within the range of rates submitted by either Plaintiffs or Defendants that are charged by attorneys in the Dallas/Ft. Worth community for services rendered in cases in this district. "When a prevailing party submits a fee application without proper documentation, the court has the discretion to reduce the award to a reasonable amount." *No Barriers, Inc. v. Brinker Chili's Tex., Inc.*, 262 F.3d 496, 500 (5th Cir. 2001). The Court finds that the market rates for similar services rendered in cases in this district do not exceed $550 per hour for partners. Therefore, the Court will reduce the hourly rate charged by Ms. McDole from $565 per hour to $550 per hour for services rendered in 2003; the hourly rate charged by Mr. Gordon will be reduced from $625 per hour to $550 per hour for services rendered in 2003 and from $595 per hour to $550 per hour for services rendered

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[1] This fee application is, coincidentally, of the law firm that has been engaged since the application to represent the Defendants.

in 2002. The court finds that all other rates charged by counsel for the Plaintiffs are reasonable hourly rates and fall within the range of rates charged in the Dallas market.

In calculating the appropriate reduction, the Court will use the same percentage allocations that Plaintiffs' counsel used to allocate their time among the various claims and counterclaims. Applying those percentages and the reduction in rates for Mr. Gordon and Ms. McDole, the Court will reduce Mr. Gordon's fees attributable to the Note and Guarantee and the VRF Services Agreement counterclaim by $437.26 and Ms. McDole's fees attributable to the Note and Guarantee and the VRF Services Agreement counterclaim by $3,074,25 for a total reduction based on the reduced hourly rates of $3,511.51.

*3. Legal Assistants*

Defendants argue that Plaintiffs cannot recover fees for legal assistants. They object on the basis that the Plaintiffs failed to show that the legal assistants were qualified and that the work performed by them was substantive. As the Defendants recognize, substantive legal work performed by a paralegal may be recovered as attorneys' fees. *See, Vela v. City of Houston*, 276 F.3d 659, 681 (5th Cir. 2001); *Clary Corp. v. Smith*, 949 S.W.2d 452, 469 (Tex. App.–Fort Worth 1997, pet. denied). To the extent that the work performed by the paralegal is clerical, it is not recoverable. *Id.* ("Paralegal work can only be recovered as attorney's fees if the work is legal rather than clerical."); *see also Gill Sav. Ass'n v. Int'l Sup. Co.*, 759 S.W.2d 697, 703 (Tex. App.–Dallas 1988, writ denied). The Court has painstakenly reviewed the time entries involved. After reviewing the Plaintiffs' fee application, the Court finds that the fee award should be reduced by $19,990.13 to account for time billed for paralegals for clerical work performed in connection with the claim on the Note and

Guaranty and the counterclaim on the VRF Services Agreement.

In addition, the Court finds that work performed by staff or assistants not trained or qualified to perform substantive legal work is not recoverable. Such work should be treated as an expense to be included in the law firm's overhead. In this case, the work by non-attorney, non-paralegal "assistants" attributable to the Note and Guaranty claim and to the defense of the VRF Services Agreement counterclaim totaled $14,884.18. Accordingly, the Court will reduce the fees requested by that amount.

*4. Preparation of Fee Application*

The Plaintiffs seek the recovery of $27,500.00 in fees for time spent in preparing the fee application. The Court will allow $12,375.00 as a reasonable fee for the preparation of the fee application, which was reached by dividing the amount of fees allowed by this Court by the total fees sought for services rendered in the course of the litigation. The Court believes that this calculation represents a fair allocation of the total time spent on the fee application to the claims for which the Court has allowed fees.

B. Expenses

The Defendants assert that under Tennessee law, which governs the VRF Services Agreement, the recovery of litigation expenses is not allowed. Citing Tennessee Rule of Civil Procedure 54.04, the Defendants argue that Tennessee law recognizes a difference between "costs" and "expenses" and that the contractual language that provides for the recovery by the prevailing party in an action on the contract of "costs and reasonable attorneys' fees" necessarily would not include litigation expenses. Because the basis for recovery of expenses would be the VRF Services

Agreement, not the Tennessee rule on taxable court costs, the language of the rule does not apply. Furthermore, the term "costs" in the contract should be interpreted according to its ordinary meaning in this context. "Costs" is defined in Black's Law Dictionary as "The expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favor of one party against the other." Black's Law Dictionary (7th ed. 1999). Thus, the Court will allow the reasonable expenses of litigation to the extent that those expenses are attributed to the prosecution of the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim.

The Plaintiffs are requesting recovery of expenses related to this litigation. Although some of the expenses were segregated based on the particular claim for which the expense was incurred, other expenses were allocated on the same percentage allocation basis used by the Plaintiffs with respect to "general" attorney time. To the extent that the expenses were "general" in nature, the Court finds, as it did regarding the allocation of attorneys' fees, that the percentage allocation method is a fair method to allocate the expenses. However, where an expense could have been specifically allocated to a particular claim but was not, the Court will make a substantial reduction in the requested amount.

Furthermore, the Plaintiffs are only allowed to recover the "reasonable" expenses of the litigation attributed to the prosecution of the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim. To the extent that the Plaintiffs did not provide sufficient documentation to establish that the expenses were reasonable, the Court will make appropriate reductions in the requested amounts.

*1. Travel*

Plaintiffs incurred $76,781.08 in travel expenses in connection with this litigation. They have attributed 38% of those expenses to the prosecution of the Note and Guaranty and the defenses of the VRF Services Agreement counterclaim. The Plaintiffs have not submitted even the minimum documentation for these expenses (which include airfare, rental car expenses, hotel expenses, and food and beverage expenses). Therefore, the Court is unable to determine if these expenses were "reasonable" expenses. For example, Plaintiffs' counsel should only be reimbursed for air travel at "coach" fares. Because the Court cannot determine whether the requested expenses for air travel are limited to coach fares, the Court will reduce this particular expense by 10%. The air fare portion of the travel expense allocated to the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim was $10,439.55. Therefore, the Court will reduce the requested expenses by $1,043.96, resulting in a total allowance for this expense of $9,395.59.

The requested reimbursement for rental car expense was not unreasonably high. Therefore, the Court will allow the full amount of the requested rental car expense allocated to the Note and Guaranty claim and the defense of the VRF Services Agreement, which amounts to $1,146.83.

Both the hotel expense and the food and beverage expense seem unreasonably high. Without detailed documentation of the expenses, however, the Court cannot make a determination as to whether the charges were in fact reasonable. Therefore, the Court will reduce each of these expenses by 10%. The hotel expense of $6,597.20 attributable to the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim will be reduced by $659.72, resulting in a total allowance for this expense of $5,937.48. The "food and beverage" expense of $6,729.34 attributable to the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim will

be reduced by $672.93, resulting in a total allowance for this expense of $6,056.41.

The Defendants assert that the Plaintiffs should not be reimbursed for travel expenses submitted by Mr. Gibson, who offices out of Jones Day's Houston office as "not necessary to the prosecution of the case." (Defendants' Response to Plaintiffs' Application, p.13). Some courts have denied reimbursement of travel expenses for a lawyer to travel from his home to the court where there has been no showing that local counsel could not have rendered the service involved. *See, In re Segal*, 145 F.3d 1348, 1353 (D.C. Cir. 1998)("As we have noted previously, expenses for travel are not reimbursable 'in the absence of some showing that local counsel could not have rendered the service involved and thereby obviated the necessity of employing an attorney' who incurs costs traveling from his home to the work site." (quoting *In re North (Bush Fee Application)*, 59 F.3d 184, 194 (D.C. Cir., Spec Div. 1995)(per curium)(other citation omitted)). Although the Court agrees that, in some situations, it would not be "reasonable" to incur travel expenses for an out-of-town attorney, the Court finds that, in this case, the travel expenses related to Mr. Gibson's travel were reasonably incurred and, in any event, were minimal in relation to the overall amount requested for travel expenses. Therefore, the Court will not make a reduction of the travel expenses based on the fact that Mr. Gibson traveled from Houston to Dallas to attend some of the hearings in this trial.

*2. Electronic Research*

The Plaintiffs are seeking recovery of $28,910.52 for computerized research fees associated with the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim. Although the Plaintiffs should have been able to segregate these fees according to the issue/claim researched, they used the percentage allocation method that they applied to "general" expenses.

Furthermore, the Plaintiffs did not provide detailed documentation that would allow the Court to make an independent determination of whether the time spent on computerized research was reasonable. Therefore, the Court will reduce the requested amount by half, resulting in a final allowable amount of $14,455.26 for electronic research expenses.

*3. Telephone and Telecopy Charges*

The Plaintiffs are requesting $4,304.45 in reimbursement for telephone and telecopy charges that the Plaintiffs have allocated to the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim. The Defendants assert that any amounts requested for telephone or telecopy charges for the sharing of information between the Jones Day offices should be disallowed. The Court rejects this argument as it is reasonable for attorneys in one office to share information with attorneys in offices of the same firm in other cities in connection with the representation of their client. The Court finds the charges reasonable and will allow them in the full amount of $4,304.45.

*4. Postage and Delivery*

The Plaintiffs seek recovery of $6,661.41 in postage and delivery expenses allocated to the Note and Guaranty claim and the VRF Services Agreement counterclaim. The Defendants did not object to these expenses. The Court finds them to be reasonable and will allow them in the full amount of $6,661.41.

*5. Expert Witness Fees*

The Plaintiffs also request reimbursement for the charges for consulting services by Value Management Group, a health care firm that provided expert witness services, in the amount of

$74,161.00, all of which was attributed to the defense of the VRF Services Agreement counterclaim. A substantial portion of these charges are for consulting services charged at $300 per hour. The Plaintiffs did not submit evidence to support fees in this range, nor did the Plaintiffs attach contemporaneous time records that should have been kept by these expert witnesses. The Court cannot make a determination, based on the information before it, of whether the rates charged, time expended, or services rendered were reasonable or necessary. Therefore, the Court will reduce the amount requested by one-half, resulting in a final allowance for this expense of $37,080.50.

*6. Graphic Services*

The Plaintiffs seek recovery of $50,184.80 in expenses related to charges for "graphic services" rendered by Barnes and Roberts and Zagnoli McEvoy in connection with the prosecution of the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim. Although charges for graphic services are generally allowable, such charges must be reasonable. Furthermore, the Plaintiffs may only recover the reasonable charges for graphic services related to the Note and Guaranty claim and the VRF Services Agreement counterclaim. In this case, Plaintiffs have used the percentage allocation method for charges for these services. While the Court has found this method to be reasonable with respect to some of the expenses incurred, the Court finds that this method, as applied to expenses for graphic services, is not a fair method of allocation. The Plaintiffs should have been able to segregate the charges among the various claims. Certain graphics were either used or proposed to be used for certain claims. The Court also notes that very few graphics were used in connection with the Plaintiffs' prosecution of the Note and Guaranty claim and defense of the VRF Services Agreement counterclaim. Furthermore, the detailed documentation

provided by Barnes and Roberts indicates hourly rates of up to $200 per hour for consulting services. There is no evidence to support these high hourly rates. The Plaintiffs also failed to submit detailed documentation of the services rendered by Zagnoli McEvoy. Based on these observations, the Court finds that the requested amount of $50,184.80 for graphic services charges is unreasonable. The Court will allow $15,000.00 as a reasonable amount for graphic services related to the prosecution of the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim.

**Summary of Allowed Attorneys' Fees and Costs**

In summary, the Plaintiffs requested $1,107,949.05 in attorneys' fees allocated to the prosecution of the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim and $27,500.00 for preparation of the fee application. The total of all reductions of these fees amounts to $53,510.82, which results in a total amount of allowed attorneys' fees of $1,081,938.23. The Plaintiffs requested $190,030.80 in expenses related to the prosecution of the Note and Guaranty claim and the defense of the VRF Services Agreement counterclaim. The Court disallowed a total of $89,097.17, resulting in a total amount of allowed expenses of $100,933.63.

**Prejudgment Interest**

The Plaintiffs seek prejudgment interest on the fraudulent transfer damages. The Defendants did not affirmatively oppose an award of prejudgment interest, but merely asserted that if prejudgment interest is awarded, it should be at the federal postjudgment interest rate and should accrue from August 7, 2001, the filing date of the complaint in this adversary proceeding. In its Findings of Fact and Conclusions of Law, the Court found in favor of the Plaintiffs on their claims for fraudulent transfer of the Land and Building and of PRG's LOI Expenses under the fraudulent

transfer provisions of § 548(a)(1) of the Bankruptcy Code and Texas fraudulent transfer law, through § 544(b) of the Bankruptcy Code. Because recovery is ultimately pursuant to federal bankruptcy law, the court will apply federal law in determining the allowance of prejudgment interest. *See, McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.)*, 52 F.3d 1330, 1339 (5th Cir. 1995)("Federal law governs the allowance of prejudgment interest when a cause of action arises from a federal statute."). In determining whether an award of prejudgment interest is proper, the Court must look at whether such an award is precluded by the federal act creating the cause of action and whether the award furthers the congressional policies of the federal act. *See id.* Noting that the Bankruptcy Code is silent regarding prejudgment interest, the Fifth Circuit, in *Texas General Petroleum*, stated that the award of prejudgment interest on a fraudulent transfer recovery "furthers the congressional policies of the Bankruptcy Code." *Id.* Thus, Plaintiffs are entitled to recover prejudgment interest on the value of the Land and Building and PRG's LOI Expenses that were fraudulently transferred.

The Plaintiffs suggest that the accrual date should be the date of transfer, while the Defendants suggest the date of the filing of the complaint in this adversary as the appropriate accrual date. In *Texas General Petroleum*, the Fifth Circuit stated, "The purpose of [§ 548] is to make the estate whole. Prejudgment interest compensates the estate *for the time it was without the use of the transferred funds*." *Texas General Petroleum*, 52 F.3d at 1339-40 (emphasis added). This Court believes this is especially true when there is a finding of actual intent to hinder, delay, or defraud creditors. Thus, prejudgment interest shall accrue from the date of the transfer of the Land and Building as well as from the date of transfer by PRG for the LOI Expenses.

Because federal law does not provide for an applicable rate, the Court will look to state law

to determine the rate to be applied. Texas law provides that prejudgment interest is calculated at the postjudgment interest rate and is computed as simple interest. *See, Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998). The interest rate in effect at this time is 5%. *See,* Tex. Fin. Code § 304.003(c).[1] Thus, Plaintiffs are entitled to an award of prejudgment interest on the judgment amount for the fraudulent transfer of the Land and Building and for PRG's transfer for the LOI Expenses at the rate of 5% from the dates of the transfers. Accordingly,

**IT IS ORDERED** that the Plaintiffs shall submit, by October 31, 2003, a form of judgment, approved as to form by counsel for the Defendants, consistent with the Court's findings in this Memorandum Opinion and its Findings of Fact and Conclusions of Law entered herein on March 14, 2003.

It is so ordered.

Signed this 23 day of October, 2003.

**HARLIN D. HALE**
**UNITED STATES BANKRUPTCY JUDGE**

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2 Although the postjudgment interest rate in Texas was 10% at the time of the filing of the Plaintiffs' Application, § 304.003(c) was amended to provide for an applicable interest rate of 5%. *See,* Acts 2003, 78th Leg., chs. 204 and 676. Although both chapters 204 and 676 provided for the same changes to § 304.003(c) of the Texas Finance Code, chapter 676 had an effective date of June 20, 2003, while chapter 204 had an effective date of September 1, 2003. The conflicting effective dates do not affect the outcome here because both chapters provide that the changes apply in any case in which a final judgment is signed or subject to appeal on or after the effective date of the Act. Acts 2003, 78th Leg., ch. 676, § 2(a); Acts 2003, 78th Leg., ch. 204, § 6.04. Because the final judgment in this case will be signed after the latest effective date, the new interest rate of 5% applies here.